

**THE STATE BAR OF CALIFORNIA
STANDING COMMITTEE ON
PROFESSIONAL RESPONSIBILITY AND CONDUCT
FORMAL OPINION NO. 2007-172**

- ISSUES:**
1. May an attorney ethically accept payment of earned fees from a client by credit card?
 2. May an attorney ethically accept payment of fees not yet earned from a client by credit card?
 3. May an attorney ethically accept payment of advances for costs and expenses from a client by credit card?

- DIGEST:**
1. An attorney may ethically accept payment of earned fees from a client by credit card. In doing so, however, the attorney must discharge his or her duty of confidentiality.
 2. Likewise, an attorney may ethically accept a deposit for fees not yet earned from a client by credit card, but must discharge his or her duty of confidentiality.
 3. By contrast, an attorney may not ethically accept a deposit for advances for costs and expenses from a client by credit card because the attorney must deposit such advances into a client trust account and cannot do so initially because they are paid through an account that is subject to invasion.

AUTHORITIES

INTERPRETED: Rules 1-320, 3-100, 3-700, 4-100, and 4-200 of the Rules of Professional Conduct of the State Bar of California.

Business and Professions Code section 6068.

STATEMENT OF FACTS

Attorney desires to accept payments and deposits from her clients by credit card for (1) earned fees, (2) fees not yet earned, and (3) advances for costs and expenses. Attorney intends to absorb the service charge debited by the credit card issuer, which would accordingly result in reducing the amount netted.

DISCUSSION

1. An Attorney May Ethically Accept Payment of Earned Fees by Credit Card.

The first question is whether an attorney may ethically accept payment of earned fees from a client by credit card.^{1/}

By way of background, a typical transaction involving a credit card issued by a bank operates as follows: “Issuing banks are members of [various] . . . not-for-profit associations of member banks that operate a worldwide communication system for financial transfers using credit cards. Issuing banks issue credit cards to consumers, enabling those consumers to make credit-card purchases at participating businesses. To accept credit cards, businesses must open an account with a merchant bank. Merchant banks, like issuing banks, are members of [the

^{1/} It should be noted that “earned fees” include fees paid pursuant to a “classic ‘retainer fee’ arrangement. A retainer is a sum of money paid by a client to secure an attorney’s availability over a given period of time. Thus, such a fee is earned by the attorney when paid since the attorney is entitled to the money regardless of whether he [or she] actually performs any services for the client.” (*Baranowski v. State Bar* (1979) 24 Cal.3d 153, 164, fn. 4.)

same not-for-profit associations], but merchant banks have accounts with businesses, not consumers. Once a business is electronically connected with a merchant bank, it can accept a consumer's credit card by processing the credit card through a point-of-sale terminal provided to it by the merchant bank. If the merchant bank approves the sale, it immediately credits the business for the amount of the consumer's purchase. The merchant bank then transmits the information regarding the sale to [the not-for-profit association in question], who in turn forward[s] the information to the bank that issued the card to the consumer who made the purchase. If the issuing bank approves the sale, it notifies [the not-for-profit association] and then pays the merchant bank at the end of the business day. The issuing bank carries the debt until the cardholder pays the bill.^{2/} From all that appears, credit card issuers deposit funds on use of a credit card into the merchant account established for that purpose at the merchant bank; the merchant bank may invade the funds via chargebacks, that is, the imposition of debits, in the event that the credit card holder disputes the charge. Whether and, if so, under what conditions a merchant account might be rendered *not* subject to invasion is unknown to the Committee. But to the extent that a merchant account *is* subject to invasion, it is not, and cannot be deemed, a client trust account.^{3/}

More than 25 years ago, in California State Bar Formal Opn. No. 1980-53, the Committee opined that an attorney may ethically charge interest on past due receivables from a client, provided that the client gives his or her informed consent in advance. In the course of its analysis, the Committee stated: "The Committee [sic] on Ethics and Professional Responsibility of the American Bar Association initially concluded that use of credit cards for payment of legal fees was unprofessional because it was 'wrong' to put professional services in the same category as 'sales of merchandise and sales of nonprofessional services,' especially when all credit card publicity was directed to such sales. (ABA Committee on Ethics and Prof. Responsibility, informal opn. No. 1120 (1969).) The Committee reiterated that this conclusion applied even when the law firm agreed not to display promotional material and where collection of accounts by the banks was without recourse. (See ABA Committee on Ethics and Prof. Responsibility, informal opn. No. 1176 (1971).) [¶] However, upon adoption of the Code of Professional Responsibility by virtually all fifty states, the American Bar Association Committee on Ethics and Professional Responsibility overruled the latter two decisions and approved use of credit cards subject to [various] conditions for services actually rendered." (Cal. State Bar Formal Opn. No. 1980-53.)

In California State Bar Formal Opn. No. 1980-53, the Committee did not resolve the question whether an attorney may ethically accept payment of earned fees from a client by credit card.

The Committee is now of the opinion that the question should be answered in the affirmative. An attorney may ethically accept payment of earned fees by check or cash. By parity, an attorney may do the same by credit card. To be sure, a generation ago, the "use of credit cards for payment of legal fees" was deemed "unprofessional." (ABA Committee on Ethics and Prof. Responsibility, Informal Opn. No. 1120 (1969).) But for many years, that has not been the case.^{4/}

Although the Committee is of the opinion that an attorney may ethically accept payment of earned fees from a client by credit card, in doing so, the attorney must nevertheless be careful to comply with various ethical obligations.

^{2/} *United States v. Ismoila* (5th Cir. 1996) 100 F.3d 380, 385-386. The law governing credit card transactions is largely based on individual contracts between credit card issuers, credit card holders, and others, and not on general statutory provisions. (See Maggs, *Regulating Electronic Commerce* (2002) 50 Am. J. Comp. L. 665, 678 ["Private contracts rather than legislative enactments establish most of the rights and duties of cardholders, card issuers, and merchants."].) As a result, the specifics of credit card transactions vary greatly the one from the other.

^{3/} See *F.T.C. v. Overseas Unlimited Agency, Inc.* (9th Cir. 1989) 873 F.2d 1233, 1233-1234. By parity, to the extent that a merchant account is *not* subject to invasion, it may be a client trust account.

^{4/} See, e.g., State Bar Policy Statement on Use of Credit Cards for Payment of Legal Services and Expenses (Feb. 11, 1975); San Diego County Bar Association Formal Opn. Nos. 1972-10, 1972-13, & 1974-6; Bar Association of San Francisco Formal Opn. No. 1970-1; cf. ABA Formal Opn. No. 00-419 (2000) (withdrawing Informal Opn. Nos. 1120 and 1176); Colorado Bar Association Formal Ethics Opn. No. 99 (1997); Mass. Bar. Association Ethics Opn. 78-11 (1978); New Mexico State Bar Association Advisory Opn. 2000-1 (2000); North Carolina State Bar Formal Ethics Opn. 97-9 (1998).

For example, an attorney must discharge his or her duty of confidentiality to clients under Business and Professions Code section 6068, subdivision (e), and under rule 3-100 of the Rules of Professional Conduct of the State Bar of California.^{5/} Credit card issuers require a description on the credit card charge slip of the goods or services provided. In furnishing such a description, the attorney may not disclose confidential information without the client's informed consent.^{6/} To that end, the description should be general in nature, such as "for professional services rendered."

By contrast, an attorney does not implicate his or her duty not to charge the client an unconscionable fee in violation of rule 4-200 simply by accepting payment of earned fees from a client by credit card. To be sure, by accepting such payment, the attorney allows the client to subject him- or herself to interest and late charges imposed by the credit card issuer. There are many credit card issuers; each may set its own interest rates and late charges separately from the rest, and in addition, each may set interest rates and late charges separately for various classes of holders.^{7/} If the attorney were attempting to subject the client to interest and late charges, the attorney would be ethically obligated to obtain the client's informed consent and comply with applicable law broadly defined,^{8/} including the prohibition of rule 4-200 against unconscionability. But the attorney is subject to no such obligation if the client chooses to subject him- or herself to interest and late charges imposed by the credit card issuer. The attorney may choose to advise the client that the client's credit card issuer sets interest rates and late charges and that the client would do well to determine such rates and charges before using the credit card, but is not ethically obligated to do so.

Likewise, an attorney does not implicate his or her duty not to share fees with a non-attorney in violation of rule 1-320 simply by accepting payment of earned fees from a client by credit card and thereby making a payment to the credit card issuer through a debit of a service charge. The purpose of rule 1-320 is "to protect the integrity of the attorney-client relationship, to prevent control over the services rendered by attorneys from being shifted to lay persons, and to ensure that the best interests of the client remain paramount."^{9/} A service-charge debit, which amounts to the attorney's payment for a convenient method of receiving funds owed the attorney, does not frustrate the purpose of rule 1-320, and for that reason does not come within the rule's proscription.

It follows that Attorney in the Statement of Facts may ethically accept payment of earned fees from her clients by credit card. Attorney may also ethically absorb the service charge debited by the credit card issuer. But as noted above, Attorney would have to be careful to discharge her duty of confidentiality to her clients.

2. An Attorney May Ethically Accept a Deposit for Fees Not Yet Earned by Credit Card.

The second question is whether an attorney may ethically accept a deposit for fees not yet earned from a client by credit card.

At the outset, the Committee is of the opinion that just as the former hostility to the "unprofessional" use of credit cards for payment of legal fees does not justify a conclusion that an attorney may not ethically accept payment of earned fees from a client by credit card, neither does it justify such a conclusion with respect to accepting a deposit for fees not yet earned—so long as the deposit, as will be explained, does not include advances for costs and expenses.

^{5/} Unless otherwise indicated, all rule references are to the Rules of Professional Conduct of the State of California.

^{6/} Cf. *Hooser v. Superior Court* (2000) 84 Cal.App.4th 997, 1005 (stating that even the fact that an attorney is representing a client may fall within the protection of the attorney-client privilege).

^{7/} See footnote 1, *ante*.

^{8/} California State Bar Formal Opn. No. 1980-53; see Bar Association of San Francisco Formal Opn. No. 1970-1; Los Angeles County Bar Association Formal Opn. Nos. 370 (1978), 374 (1978) & 499 (1999); San Diego County Bar Association Formal Opn. No. 1983-1; cf. ABA Formal Opn. No. 388 (1974).

^{9/} Los Angeles County Bar Association Formal Opn. No. 510 (2003); accord, *Gafcon, Inc. v. Ponsor & Associates* (2002) 98 Cal.App.4th 1388, 1418; see, e.g., *Gassman v. State Bar* (1976) 18 Cal.3d 125, 132.

Under rule 4-100, an attorney is subject to an ethical obligation to “deposit[]” “[a]ll funds received or held for the benefit of clients” into a client trust account. (Rule 4-100(A).) This ethical obligation is not qualified, conditional, or avoidable, and therefore does not allow the attorney, with or without the client’s consent, to take such actions as depositing client funds initially into an account other than a client trust account and subsequently transferring them into a client trust account if or when reasonable or practicable. The attorney is subject to a concomitant ethical obligation, which is “both personal and nondelegable,” to “take reasonable care to protect client funds” deposited into a client trust account.^{10/}

Under rule 4-100, as it has been construed by the courts, an attorney is ethically permitted, but not required, to deposit fees not yet earned into a client trust account.^{11/}

If an attorney were required to deposit fees not yet earned into a client trust account, the attorney would not be permitted to accept such a deposit from a client by credit card *to the extent that the credit card issuer deposits funds into a merchant account that is subject to invasion*. That is because to that extent: (1) the credit card issuer deposits the funds into a merchant account; (2) the attorney, however, must deposit the funds into a client trust account; (3) the attorney must take reasonable care to protect the funds deposited into a client trust account; and (4) before the attorney can assert control over the funds, the merchant bank may invade the funds in the merchant account, thereby putting the funds at risk beyond the attorney’s protection. As a consequence, the attorney could not immediately deposit such fees into a client trust account or take care to protect them, but would have to cede control to the merchant bank, at least initially.^{12/}

^{10/} California State Bar Formal Opn. No. 2005-169.

^{11/} *Securities and Exchange Commission v. Interlink Data Network of Los Angeles, Inc.* (9th Cir. 1996) 77 F.3d 1201, 1205-1207 (semble); see generally Vapnek et al., *Cal. Practice Guide: Professional Responsibility* (The Rutter Group 2006) §§ 9:107-9.108.

In *Baranowski v. State Bar*, *supra*, 24 Cal.3d at page 164, the Supreme Court left open the question whether the substantially identical predecessor of rule 4-100 required an attorney to deposit payment of fees not yet earned—so-called advance fees—into a client trust account. The Supreme Court has not given an answer in any subsequent decision. But it has nevertheless effectively articulated its views. “Although expressly not deciding the advance fee issue in *Baranowski*, . . . the Cal. Supreme Court did approve current [Rule] 4-100 as proposed by the State Bar. In recommending the current Rule, the State Bar specifically noted that it did not intend the Rule to require advance fees to be deposited in a client’s trust account: [¶] ‘The concept of including in paragraph (4-100)(A) a requirement that “advances for fees” be placed in the client trust account was considered but rejected because it is believed that such a provision is unworkable in light of the realities of the practice of law.’ [In the Matter of the Proposed Amendments to the Rules of Professional Conduct, California Supreme Court Case No. Bar Misc. 5626, at ‘Request that the Supreme Court of California Approve Amendments to the Rules of Professional Conduct of the State Bar of California, and Memorandum and Supporting Documents in Explanation,’ at Memorandum, Dec. 1987, p. 42 (parentheses added)]” (Vapnek et al., *Cal. Practice Guide: Professional Responsibility* (The Rutter Group 2006) § 9:107.2.) In approving rule 4-100 as recommended, the Supreme Court allowed an attorney not to deposit advance fees into a client trust account. Since that time, it has “declined to approve a proposed rule amendment requiring advance fees to be paid into client trust accounts.” (*Ibid.*; see “Request for Approval of Amendments to Rules 3-700 and 4-100 of the Rules of Professional Conduct,” No. S029270 (May 11, 1995).)

It may be noted that, in *T & R Foods, Inc. v. Rose* (1996) 47 Cal.App.4th Supp. 1, 7, the Appellate Department of the Superior Court construed rule 4-100 to require an attorney to deposit payment of fees not yet earned into a client trust account, but did so without consideration of the Supreme Court’s action, and inaction, with respect to rule 4-100 following *Baranowski*.

^{12/} Of course, even though funds deposited into a client trust account are not subject to invasion as are funds deposited into a merchant account, they may suffer a similar adverse effect in their amount or availability as a result of acts or omissions by the attorney—who might, for example, erroneously issue a check against insufficient funds in the client trust account—or by others—including the bank, which might, for instance, mispost a check intended for deposit into the client trust account. The possibility of such adverse effects, however, does not release the attorney from the ethical obligation to deposit funds into a client trust account. Neither does that possibility allow

But because an attorney need not deposit fees not yet earned into a client trust account, the attorney may accept such a deposit by credit card, resulting in a deposit into a merchant account.

The fact that an attorney need not deposit fees not yet earned into a client trust account does not mean that, solely as a matter of prudence, the attorney should decline to do so. Upon termination of employment, an attorney is subject to an ethical obligation under rule 3-700(D)(2) to “[p]romptly refund any part of a fee paid in advance that has not been earned.” Failure to deposit such fees into a client trust account risks their unavailability at the time, if any, at which they must be refunded. After they are deposited in a merchant account by a credit card issuer, such fees may ethically be transferred into a client trust account. By means of such a transfer, an attorney would ensure their availability should he or she be required to refund any or all of them to the client. Although not ethically required to make a transfer of this sort, the attorney may consider doing so solely as a matter of prudence.

It follows that Attorney in the Statement of Facts may ethically accept a deposit for fees not yet earned from her clients by credit card. As stated above, she may also ethically absorb the service charge debited by the credit card issuer. But again, as stated above, she would have to be careful to discharge her duty of confidentiality to her clients.

3. An Attorney May Not Ethically Accept A Deposit for Advances for Costs and Expenses by Credit Card.

The third question is whether an attorney may ethically accept a deposit for advances for costs and expenses from a client by credit card.

Under rule 4-100, among the “funds received or held for the benefit of clients” that an attorney is ethically obligated to deposit into a client trust account are “advances for costs and expenses.” (Rule 4-100(A).)

Because an attorney must deposit advances for costs and expenses from a client into a client trust account, he or she may not ethically accept such a deposit by credit card, as explained above, *to the extent that the credit card issuer deposits funds into a merchant account that is subject to invasion*. It follows that the attorney may not ethically accept any payment or deposit from a client by credit card, whether for earned fees or fees not yet earned, if the payment or deposit includes advances for costs and expenses.^{13/} The attorney, however, *may* accept reimbursement by credit card for costs and expenses already paid. By definition, reimbursement of costs and expenses already paid does not constitute an “advance” of such costs and expenses, and consequently it need not—and indeed may not—be deposited into a client trust account.

It follows that Attorney in the Statement of Facts may not ethically accept a deposit for advances for costs and expenses from her clients by credit card. She may, however, accept reimbursement by credit card of costs and expenses already paid.

This opinion is issued by the Standing Committee on Professional Responsibility and Conduct of the State Bar of California. It is advisory only. It is not binding upon the courts, the State Bar of California, its Board of Governors, any persons, or tribunals charged with regulatory responsibilities, or any member of the State Bar.

the attorney to deposit funds into an account other than a client trust account if he or she is ethically obligated to deposit them into a client trust account.

^{13/} See footnote 12, *ante*.